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IN THE

Supreme Court of the United States

October Term, 1966
No. 769

RAPHAEL J. CHERVY and DOROTHY E. CHERVY,

Petitioners,

vs.

PENINSULAR & ORIENTAL STEAM NAVIGATION COMPANY, Limited,

Respondent.

Brief in Opposition to Issuance of Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable, the Supreme Court of the United States:

Comes Now respondent and submits this brief in opposition to the issuance of a writ of certiorari in this cause to the United States Court of Appeals for the Ninth Circuit.

Questions Presented.

Petitioners have framed two questions which they seek to have reviewed by this court. It is respectfully suggested, however, that the only questions raised by the decision of the Court of Appeals in this matter are:

(1) Does a shipowner's duty of reasonable care toward all who are lawfully aboard its vessel,

under the circumstances of the case, require a specific warning (in the last of three broadcasts warning visitors to depart) that preparations to land the gangway would commence prior to the vessel's scheduled time of departure, and that such preparations would make it dangerous for visitors to delay their disembarkation.

(2) Under the facts of the instant action, was respondent Peninsular and Oriental Steam Navigation Company, Limited (hereinafter referred to as P. & O.) negligent, proximately causing injury to Raphael J. Chervy.

It is apparent that both of the questions raised by the decision of the Court of Appeals in this cause are predominantly factual issues. The petition makes a valiant effort to create "issues of law", and to demonstrate a conflict among the decisions of various Courts of Appeal and this Court with respect to an important question of law. As pointed out in the Argument of this brief, petitioners' efforts fail, being predicated upon a misinterpretation of the decision of the Court of Appeals in this action.

Petitioners' efforts to create "issues of law" cannot disguise the fact that their basic objective is to have the facts reviewed by this Court after the Court of Appeals very carefully considered them, reversed one of the District Court's findings as clearly erroneous, affirmed the remaining findings as not clearly erroneous, and affirmed the judgment without reaching the issue of the validity of the exculpatory clause. In doing so, petitioners disregard the repeated holdings of this Court that it does not sit in judgment on questions of fact

and conflicts of evidence, and that certiorari does not lie to determine whether the evidence supports the findings. The rule has been enunciated and applied by this Court in many cases, including the following:

> "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston,* 268 U.S. 220 at 227, 69 L. Ed. 925 at 926.
>
> "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." *General Talking Pictures Co. v. Western Electric Co.,* 304 U.S. 175 at 178, 82 L. Ed. 1273 at 1275.

Statement of the Case.

Although petitioners state that "The facts are not in dispute." (Pet. Cert. p. 2) a number of facts are in dispute and others of importance were omitted from petitioners' Statement of the Case. The following are the pertinent facts:

On October 16, 1961 [Tr. p. 113] at approximately 8:00 p.m. petitioners boarded the SS ARCADIA, then docked at Long Beach, California, as social guests of crew members [Tr. pp 118-120, 310, 431-433]. Prior to boarding Chervy executed a boarding pass containing an exculpatory clause [Tr. p. 117].

At approximately 11:45 p.m. petitioners, with their children and a friend, arrived at the foyer opposite the gun port door from which petitioners were to leave the vessel [Tr. pp. 92, 98, 309].

The vessel's public address system, at ten minute intervals, broadcast warnings that visitors should disembark as the vessel was preparing to sail, the last broadcast, which stated that it was the final one, being made

at approximately 11:40 p.m. [Tr. pp. 52-53]. Mrs. Chervy, and the Chervy children departed the vessel shortly after arrival in the foyer [Tr. pp. 302, 309, 467] but Mr. Chervy remained on board until approximately 11:58 p.m. [Resp. Ex. A].

Approximately five minutes prior to the vessel's scheduled midnight departure David Hodgson, manager of P. & O.'s local agent, departed the vessel after advising the gangway officer that the agents and officials were ashore [Tr. pp. 63, 215-216].

The gangway in question is three feet six inches wide, and had railings which extended to within three feet of the side of the vessel [Resp. Ex. B]. The gaps between the end of the railings and the side of the vessel were closed by rope lashings until approximately 11:58 p.m. [Resp. Ex. A], at which time they were removed so that the gangway could be landed and the vessel could depart at midnight [Resp. Ex. A]. Hodgson's departure from the vessel was prior to the removal of the lashings [Tr. pp. 61-63]. Just after the lashings were removed Chervy exited through the gun port door onto the gangway, turned to his left as though to wave to someone on board the vessel and toppled backward from the gangway [Tr. p. 466].

After trial the District Court denied recovery to petitioners on the ground that they were barred by the exculpatory clause in the boarding pass executed by Chervy prior to boarding the ARCADIA. Thereafter, by Supplemental Memorandum Opinion, the District

Court held that Chervy had been damaged in the sum of $70,773.15; that both Chervy and P. & O. were negligent; that the negligence of Chervy contributed 60 per cent to his injury and damages, and that of P. &. O. 40 per cent. The District Court therefor held that, but for the exculpatory provisions of the boarding pass, Chervy would be entitled to recover the sum of $28,-295.26. The District Court found that P. & O.'s only negligence was that its last broadcast failed to specifically warn that preparations to land the gangway would commence prior to midnight, which preparations would make it dangerous for visitors to delay their disenbarkation. The United States Court of Appeals for the Ninth Circuit, held that the District Court's finding the P. & O. was negligent, as specified above, was clearly erroneous, but that its finding that P. & O. was not otherwise negligent was not clearly erroneous. The Court of Appeals therefore affirmed the judgment, concluding that it was not necessary to consider the validity of the exculpatory clause.

ARGUMENT.

I.

Introduction.

In their petition, petitioners erroneously attempt to construct a conflict between the decision of the Ninth Circuit Court of Appeals in this case, the decision of this Court in *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, and the decision of the Court of Appeals for the Second Circuit in *McCann v. Anchor Line,* 79 F. 2d 338 (2 Cir. 1935). They likewise erroneously claim that the Court of Appeals for the Ninth Circuit decided an important issue incorrectly. These arguments are predicted upon two fundamental errors.

Firstly, petitioners persistently treat their Petition for a Writ of Certiorari as though the decision and judgment to be reviewed were that of the District Court, rather than that of the Court of Appeals. Thus, their entire argument relating to the validity of the exculpatory clause in the boarding pass deals solely with the decision of the District Court, and not with the decision of the Court of Appeals which affirmed without reaching that issue, by reason whereof such issue is not before this court. There is no more reason to grant certiorari because of the importance of an issue which might have been decided by a Court of Appeals, but was not, than there is with respect to a state court decision raising an important federal question, but which is sustainable on an independent ground.

Secondly, petitioners erroneously contend (Pet. Cert. pp. 8, 10) that the Court of Appeals held that P. & O. owed no duty to Chervy. The Court of Appeals did

not so hold. The Court of Appeals held that under the circumstances, P. & O. was not obligated to advise in its final broadcast that preparations to land the gangway would commence prior to midnight and that such preparations would make it dangerous for visitors to delay their disembarkation. The reversal by the Court of Appeals of the District Court's holding that P. & O. was negligent in this particular, coupled with affirmance of the District Court's finding that P. & O. was not otherwise negligent, result in the determination that P. & O. did not fail to fulfill the duties which it owed to petitioners. This is far different from the conclusion drawn by petitioners that the Court of Appeals thereby held that P. & O. "... owed no duty to Chervy at all." (Pet. Cert. p. 8), a conclusion which has no basis in law, fact or reason. The crux of petitioners' error is their incorrect assumption that a finding of no negligence is the equivalent of a finding of no duty.

II.

The Decision of the Court of Appeals Does Not Violate the Standards Established in Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625.

Petitioners' contention, that their petition should be granted because the Court of Appeals failed to comply with the standards set by this Court in *Kermarec* falls because it is predicated upon the erroneous assertion that the Court of Appeals held that P. & O. owed no duty to Chervy, whereas in fact the Court of Appeals held that P. & O. was not negligent toward Chervy.

III.

The Decision of the Court of Appeals Does Not Conflict With the Decision of the Court of Appeals for the Second Circuit in McCann v. Anchor Line (2 Cir. 1935), 79 F. 2d 338.

Petitioners contend that the Court of Appeals' decision is in conflict with the principle of the decision of the Court of Appeals for the Second Circuit in *McCann v. Anchor Line.* This contention is erroneous because it is entirely predicated upon language in the District Court's Memorandum Opinion dealing exclusively with the exculpatory clause. This language is not now pertinent because the Court of Appeals did not reach the issue of the validty of the exculpatory clause.[1]

IV.

The Decision of the Court of Appeals Is Not Erroneous.

Petitioners' claim, that the decision of the Court of Appeals is erroneous, is based upon two grounds: (1) that the Court of Appeals erroneously held that P. & O. owed no duty to Chervy; and (2) that therefore the Court of Appeals erroneously determined that it was

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[1]In addition, there is no conflict between the District Court's language in this case and that of the Court of Appeals in *McCann.* The District Court in this action was dealing with the distinction between a visitor and a passenger as it bears on the public policy question of the validity of an exculpatory clause; the Court of Appeals in *McCann* was dealing with a determination of whether or not a visiting friend of a passenger was "an invited person" or "business visitor" in order to ascertain the standard applicable to such person (*McCann,* of course, was a pre-*Kermarec* case). Further, the rationale of the *McCann* case rests upon the economic benefit to a shipowner of visiting friends of the passengers, whereas the instant action involves social guests of crew members.

unnecessary to consider the issue of the validity of the exculpatory clause in the boarding pass. Petitioners err on both counts. As previously indicated in Section I of the Argument of this brief, the Court of Appeals did not hold that Chervy was owed no duty by P. & O. Instead, it held that P. & O. was not negligent. It follows therefore that the Court of Appeals did not err in declining to rule on the validity of the exculpatory clause.

V.

No Question of Continuing Importance in Admiralty Is Presented by the Instant Action.

Pettioners' final reason for the granting of their petition is that the case presents a question of continuing importance in admiralty law. The entire argument in this regard is predicated upon the importance of a determination of the effect of 46 U.S.C. Section 183(c) upon exculpatory clauses in boarding passes executed by social guests of crew members. Such issue was neither considered nor decided by the Court of Appeals in this action. There is even less reason for the Court to Grant certiorari to review this issue, in a case in which it is not presented by the determination of the Court of Appeals, then there was for the Court to determine the issue in *Kermarec* where certiorari had been granted because of the importance of another issue in the case; yet in *Kermarec* this Court specifically declined to decide that issue because it was not clearly presented.

Conclusion.

Thus, the decision of the Court of Appeals (1) does not violate standards set by this Court, (2) does not conflict with the decisions of other Courts of Appeal, (3) is not erroneous, and (4) presents no questions of importance in the administration of maritime law. Petitioners seek merely to have this Court review the facts of this particular case, by reason whereof the petition for certiorari should be denied.

Respectfully submitted,

FRANCIS L. TETREAULT,
Attorney for Respondent.